83-1337

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERO LANDS COMPANY, HERO WALL COMPANY, NEW CITY COMPANY and NUMA C. HERO, JR., d/b/a HERO COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Robert L. Redfearn
of
SIMON, PERAGINE, SMITH & REDFEARN
4300 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 522-3030

Counsel for Petitioners

February, 1984

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether distribution to the public by the Department of the Navy of a study stating that petitioners' uninhabited and undeveloped lands, which adjoin land subject to a previously acquired avigation easement, are not suited for residential development because of exposure to aircraft noise generated by military aircraft, commences the accrual of time within which an action against the United States must be brought for an uncompensated taking of an additional avigation easement.

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IN THE
SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioners, Hero Lands Company, Hero Wall Company, New City Company, and Numa C. Hero, Jr., d/b/a Hero Company[1] respectfully pray that a writ of

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[1] Hero Lands Company, Hero Wall Company, and New City Company are corporations organized under the laws of the State of Louisiana. They do not have a parent corporation, nor do they have any subsidiaries or affiliates. Numa C. Hero, Jr., d/b/a Hero Company, is the duly authorized partner in Hero Company, an ordinary partnership formed in 1975 under the laws of the State of Louisiana. At the time of its formation, the partners were: Numa C. Hero, Jr., George A. Hero, Jr., Helene Claire Hero Rufty, Myrthe LeBorgeois, O. J. Johnson, Celeste B. H. Martin, Caroline G. H. Ephrime, Claire H. Martin, Dr. Numa C. Hero, III, George A. Hero, Kathleen Hero Prickitt, Claire C. Hero, and Austin L. Roberts, III, Numa C. Hero, Jr., as trustee of the following trusts: Fenella Claire Roberts, Gretchen M. Roberts, and Barbara E. Roberts; and Alfred O. Hero, Jr., as trustee of the trust for the benefit of the children of Alfred O. Hero, Jr., and Numa C. Hero.

certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on November 10, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit, not reported, appears in the Appendix hereto, as does the opinion of the Claims Court, which is reported at 1 Cl. Ct. 102, 554 F.Supp. 1262.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on November 10, 1983 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amentment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 28:

§1491. Claims against United States generally; actions involving Tennessee Valley Authority.

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extra-

ordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

United States Code, Title 28:

§2501. Time for filing suit.

Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operation on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

STATEMENT OF THE CASE

Petitioners own a substantial amount of open and uninhabited land located adjacent to or in the immediate vicinity of the Naval Air Station, New Orleans, in Plaquemines Parish, Louisiana. (Hereinafter referred to as "NAS NO").[2]

At the time military aircraft operations began at NAS NO—1958—the United States had acquired avigation easements burdening a portion of petitioners' property. (Cl.Ct. App. A-6).

On March 5, 1979, the Department of the Navy released for public distribution a document entitled "Air Installations Compatible Use Zone Study, Naval Air Station New Orleans" (hereinafter referred to as the "AICUZ study"), which classifies portions of petitioners' property *not subject to but adjoining land subject to the avigation easement* as unsuitable for residential development as a result of its exposure to military aircraft overflights. (Cl.Ct., App. A-13).

The Department of the Navy furnished copies of the AICUZ study to various public bodies and institutions, including: the Plaquemines Parish Development Planning

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[2] The greater part of petitioners' property is open, uninhabited property which was, at the time this action was filed in the Claims Court, not used for residential or commercial purposes. Petitioners contemplate residential and commercial development of their property, although they are unable to predict when such development will become feasible. (Claims Court Opinion, Appendix, Pages A-9, A-12, A-13, [hereinafter Cl.Ct. App. __]).

Due to the fact that the opinion of the Court of Appeals for the Federal Circuit is limited to one paragraph, petitioners will refer to the opinion of the Claims Court, a copy of which is attached hereto in the appendix, in support of certain factual representations set forth herein.

Board, Plaquemines Parish Commission Council, Belle Chasse City Library, State of Louisiana Bureau of Environmental Services, Veterans Administration Regional Board, and the New Orleans office of the Department of Housing and Urban Development.

Petitioners filed this action on November 28, 1979 in the United States Claims Court under 28 U.S.C. §1491 seeking just compensation for the taking of an avigation easement. The Claims Court found that portions of petitioners' property *not covered by the original avigation easement* were subject to regular and frequent low level overflights by military jet aircraft interfering with the use and enjoyment of petitioners' property resulting in a diminution of the property's value. (Cl.Ct. App. A-13, A-14, A-15). However, the court dismissed petitioners petition because their claims were time-barred.

The decision of the Claims Court was affirmed by the Court of Appeals for the Federal Circuit. The Federal Circuit held that petitioners' claims were barred by the statute of limitations and that if any taking had occurred, it occurred more than six years prior to the filing of this action.

REASONS FOR ALLOWANCE OF THE WRIT

The Decision Below Raises a Significant Issue Concerning The Accrual of a Cause of Action for the Uncompensated Taking of an Avigation Easement.

Presumably, the Federal Circuit adopted the reasoning of the Claims Court as it held that petitioners' claims were barred by the six-year statute of limitations set forth in 28 U.S.C. §2501. The Claims Court's opinion demonstrates that, in determining that petitioners' claims were time

barred, the court employed the traditional test and scrutinized the military aircraft operations conducted at NAS NO, paying particular attention to the fact that jet aircraft operations had been conducted at NAS NO since 1958. The Claims Court and the Federal Circuit did not address the argument that petitioners did not and could not discover the extent of the impairment of their property rights until the issuance of the AICUZ study in 1979, because the land subject to overflights was uninhabited.

This case presents an issue of first impression that calls for this Court's resolution and guidance. The Department of Defense has devised the Air Installations Compatible Use Zones program which acknowledges and quantifies the detrimental effects of noise generated by military jet aircraft and in so doing has informed the public that (1) the government has invaded the airspace above lands in the vicinity of military air installations and (2) that the invasions carry detrimental effects that may render the lands unsuitable for residential development. 32 C.F.R. §§256.1-256.11. In the case of uninhabited, undeveloped lands, the publishing and distribution of the AICUZ study frequently marks the point in time when the owner of the affected lands becomes aware of the extent of the impairment of its rights, because there are no persons on the ground beneath the flight patterns who may be used as a yardstick with which to measure the impact of aircraft noise. The AICUZ program explicitly informs the owner and the public for the first time that the land is not only subject to jet aircraft overflights, but also that the land is unsuitable for residential development as a result of the overflights.

The value of much of petitioners' property lies primarily in its speculative value, that is, in its potential for future residential and commercial development. (Ct.Cl.

App. A-13). The interference with the enjoyment and use of petitioners' property and the resulting diminution in value occurred when the existence and impact of the overflights was revealed to the general public in the AICUZ study.

The unconditional reliance on existing precedent addressing the issue of the accrual of actions under 28 U.S.C. §1491 has the effect of depriving the owners of uninhabited property in the vicinity of military air installations of a remedy.[3] The traditional test may function without injustice in those situations where the property subject to overflights is inhabited or subject to human activities, because it is fair to hold the owners responsible for an awareness of the impact of noise generated by aircraft flying directly above them.

By contrast, in the case of uninhabited, undeveloped property, is it fair to hold absent owners responsible for an awareness of noise that they cannot experience? Particularly, in instances such as here when the land being subjected to overflight adjoins lands already subject to an avigation easement making it almost impossible for the landowner to realize that an additional taking is in process. To answer in the affirmative will enable the Government to act in a manner resulting in the diminution of the value of such property without the corresponding obligation to compensate the landowner. The Government need only insure that six years pass between the time that regular and frequent overflights began

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[3] A recent Claims Court decision stated the test to be as follows:

> "The taking of an avigation easement by the Government occurs when the Government begins to operate aircraft regularly and frequently over a parcel of land at low altitudes, with the intention of continuing such flights indefinitely."

Lacey v. United States, 219 Ct.Cl. 551, 559, 595 F.2d 614, 618 (Ct. Cl. 1979).

and the issuance of an AICUZ study in order to escape liability.

This Court has recognized that the Fifth Amendment embodies a principle of fairness that precludes application of an inflexible rule of limitations:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947).

The Claims Court and presumably the Federal Circuit looked at the physical invasion of petitioners' property, determined that the physical invasion occurred more than six years prior to the filing of this suit, and concluded that the action was time barred. Petitioners submit that a rule whereby an owner of uninhabited land is deemed to have knowledge of aircraft overflights notwithstanding the fact that the owner or anyone acting on behalf of the owner does not occupy the land, does not embody the principle of fairness expressed by the Fifth Amendment.

Fairness requires that, with respect to uninhabited property, the cause of action for a taking of an avigation easement accrues when the extent of the damage suffered by the landowner becomes apparent, which is upon publication and distribution of a study cataloging the physical invasion and the resulting damage. Such a rule is consistent with

United States v. Dickinson, which held that a cause of action arising from the flooding of land accrues when "the consequences of...[the physical invasion] have so manifested themselves that a final account may be struck." 331 U.S. at 749, 67 S.Ct. at 1385.

This issue affects not only petitioners, but also anyone owning uninhabited property in the vicinity of a military air installation because, as set forth in 32 CFR §256.5, the Department of Defense has directed that an AICUZ study be implimented at every military air installation, and undoubtedly other landowners will learn for the first time by virtue of such publications that their uninhabited, undeveloped property is and has been made unsuitable for residential development as a result of military aircraft operations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Federal Circuit.

Respectfully submitted:

Robert L. Redfearn
of
SIMON, PERAGINE, SMITH & REDFEARN
4300 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 522-3030

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 1984, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 10530. I further certify that all parties required to be served have been served.

Respectfully submitted:

Robert L. Redfearn
of
SIMON, PERAGINE, SMITH & REDFEARN
4300 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 522-3030

Attorney for Petitioners

APPENDIX "A"

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-839

HERO LANDS COMPANY, ET AL.,

Appellants

v.

THE UNITED STATES,

Appellee

DECISION: November 10, 1983

Before MARKEY, *Chief Judge*, FRIEDMAN and RICH, *Circuit Judges*.

MARKEY, *Chief Judge*.

DECISION

The judgment of the U. S. Claims Court is *affirmed*.

OPINION

The statute of limitations bars all appellants' claims. If any taking occurred, it occurred more than six years before this action was filed, and changes in 1978-1979 were insufficient to constitute a new taking.

APPENDIX "B"

UNITED STATES CLAIMS COURT

No. 538-79L
(Decided January 20, 1983)

HERO LANDS COMPANY, HERO WALL COMPANY, NEW CITY COMPANY, and HERO COMPANY

v.

THE UNITED STATES

Taking by inverse condemnation; avigation easements; proof of substantial interference with use and enjoyment of land; protected and unprotected airspace; statute of limitations.

Robert L. Redfearn, New Orleans, Louisiana, attorney of record, for plaintiffs. *Daniel J. Caruso, John C. Herbert*, and *Simon, Peragine, Smith & Redfearn*, of counsel.

James E. Brookshire, Washington, D.C., with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant. *Edward J. Passarelli* and *Robert N. Kittel*, Office of General Counsel, Department of the Navy, of counsel.

OPINION

WHITE, *Senior Judge*.

The plaintiffs sue in this case because the Government allegedly has taken, without just compensation, so-called avigation easements in the airspace above a number of tracts of land which the plaintiffs severally own in Plaquemines Parish, Louisiana. The action is based on flights by military jet aircraft of the defendant through the airspace above the tracts in question.

As explained later in the opinon, it is concluded that the plaintiffs are not entitled to recover.

The plaintiffs' lands—designated in the record as tracts numbered 1 through 16 (and sometimes referred to collectively hereafter in the opinion as "the Hero lands" or as "the plaintiffs' lands")—are located either adjacent to or quite near the Naval Air Station New Orleans (NAS NO). NAS NO is located in Plaquemines Parish, approximately 6 miles south of the City of New Orleans, and is operated by the Department of the Navy. NAS NO was commissioned as a naval installation of the United States in 1957, and aircraft operations began there in 1958.

At all times material to this case, the Naval Air Reserve, the Marine Corps Air Reserve, the Air Force Reserve, and the Louisiana Air National Guard have regularly conducted aircraft operations at NAS NO, and defendant's aircraft, including military jet aircraft, operating from NAS NO have regularly and frequently overflown the Hero lands.

Although all 16 of the plaintiffs' tracts are located either adjacent to or near NAS NO, it is necessary to divide the plaintiffs' lands into different categories for a clear understanding of the issues that are involved in the litigation.

Lands Suitable for Industrial Development

The evidence shows that the highest and best use for tracts 8, 14, 15, and 16, and for parts of tracts 7, 9, 10, and 12, has been and is now for industrial development, together with supportive activities. The evidence also shows that the usefulness for industrial development of the portions of the plaintiffs' lands mentioned in the preceding sentence has not been adversely affected to a substantial degree, and the value of these portions for such purpose has not been substantially diminished, as a result of the defendant's aircraft operations at NAS NO.

This court's predecessor, the U.S. Court of Claims, whose decisions are binding on this court, established the rule that, so long as flights by government-owned aircraft through the airspace above land do not interfere substantially with the use and enjoyment of the property, the Government is not liable to the landowner for the taking of an avigation easement, even though the flights are at impermissibly low altitudes (*e.g., Adaman Mutual Water Co. v. United States,* 143 Ct. Cl. 921, 923, 181 F. Supp. 658, 659 (1958); *Mid-States Fats and Oils Corp. v. United States,* 159 Ct. Cl. 301, 304 (1962); *Aaron v. United States,* 160 Ct. Cl. 295, 298, 311 F. 2d 798, 800 (1963); *A. J. Hodges Industries, Inc. v. United States,* 174 Ct. Cl. 259, 264, 355 F. 2d 592, 595 (1966); *see Jensen v. United States,* 158 Ct. Cl. 333, 340, 305 F. 2d 444, 448 (1962)).

As the regular and frequent flights by defendant's aircraft through the airspace above the portions of the Hero lands discussed in this part of the opinion have not resulted in any substantial interference with the use and enjoyment of such lands for the purpose for which they are best suited, or in any substantial diminution in their value,

it necessarily follows that the defendant is not liable to the plaintiffs for the taking of avigation easements over the tracts and parts of tracts previously enumerated.

It should also be mentioned that the evidence in the record does not show the heights at which the defendant's aircraft have regularly and frequently passed over tracts 10, 14, 15, and 16. With respect to tracts 7, 8, 9, and 12, the minimum heights of overflights, as shown by the evidence, were 600 feet for tract 7, 700 feet for tracts 9 and 12, and 1,000 feet for tract 8. The factor of overflight heights will be discussed later in connection with other tracts owned by the plaintiffs.

With respect to tracts 8, 10, and 12, it is also appropriate to mention that, more than 20 years before the plaintiffs' complaint in the present action was filed, the defendant acquired avigation easements for the free and unobstructed passage of aircraft through the airspace over certain of the Hero lands, including most of tracts 8 and 10, and over a portion of tract 12. The plaintiffs have not established in the present action that defendant's military jet aircraft have regularly and frequently invaded portions of the airspace over tracts 8, 10, and 12 not involved in the early easements. This factor will also be discussed later in connection with another tract.

Height of Overflights

Consideration will be given next to tracts 1, 2, 3, 4, 5, and 13, and in parts of tracts 7, 9, 10, and 12 that are not suitable for industrial development.

The evidence in the record does not disclose the minimum heights at which the defendant's military jet

aircraft have regularly and frequently flown above 1, 2, 3, 4, 5, 10, and 13.[1] Inasmuch as the record does show the minimum heights—varying from 200 feet to 1,000 feet above ground level—at which the defendant's military jet aircraft regularly and frequently flew over certain other Hero lands, it is inferred, and found, that overflights above the areas mentioned in the preceding sentence were at heights greater than 1,000 feet above ground level.

With respect to tracts 7, 9, and 12, the evidence in the record shows that the minimum heights of flights above these areas were 600 feet for tract 7, and 700 feet for tracts 9 and 12.[2]

In dealing with cases involving claims by landowners against the Government for the alleged taking of avigation easements without just compensation, it has been necessary for the courts to weigh the conflicting interests of landowners in the use and enjoyment of their lands without annoyance from overflights by aircraft and without danger attributable to overflights, and, on the other hand, the interests of the Government and of the general public in the free use of the airspace in this air-minded age for national defense and transportation purposes. In the benchmark case of *United States v. Causby*, 328 U.S. 256 (1946), the Court said (at 264-65) that a landowner is protected against intrusion in the airspace above the land so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his

[1] The same is true of tracts 14, 15, and 16, discussed in the preceding part of the opinion.

[2] The minimum height of flights over tract 8, discussed in the preceding part of the opinion, was 1,000 feet above ground level.

exploitation of it. On the other hand, the Court referred (at 261) to the air as a public highway and (at 266) to the airspace overhead as being part of the public domain.

Without the *Causby* decision as a guideline, the Court of Claims used the 500-foot height above ground level as the dividing line between the portion of the lower airspace in which landowners in uncongested areas are protected against intrusion by aircraft, and the upper portion of the airspace in which aircraft enjoy the right of free passage without liability to the owners of lands below. For example, in the case of *Aaron v. United States*, 160 Ct. Cl. 295, 311 F. 2d 798 (1963), the Court of Claims said (160 Ct. Cl. at 307) that in uncongested areas the airspace over land up to an altitude of 500 feet above the ground is not subject to the public right of freedom of air navigation, and also said (160) Ct. Cl. at 319) that the airspace beginning at an elevation of 500 feet above the ground is part of the public domain and is subject to the public right of freedom of navigation.

The Court of Claims explained in *Aaron* (160) Ct. Cl. at 300, 311 F. 2d at 801) that the choice of 500 feet above ground level as the dividing line between protected and unprotected airspace over uncongested areas was based on the Air Commerce Act of 1926 (44 Stat. 568), as amended by the Civil Aeronautics Act of 1938 (52 Stat. 573); that this legislation granted to any citizen a public right of freedom of transit through the navigable airspace of the United States,[3] and it defined "navigable airspace" as airspace above the minimum safe altitude of flight prescribed by the

[3] This provision is now codified in 49 U.S.C. § 1304 (1976).

Civil Aeronautics Authority;[4] and that the Civil Aeronautics Authority (now the Civil Aeronautics Board) had fixed 500 feet above ground level as the minimum safe altitude for flights over uncongested areas, and 1,000 feet for flights over congested areas.

All of the Hero lands involved in this action, with the exception of a portion of tract 7 that is being used for industrial purposes, are uninhabited, open lands.

Except for one case, all decisions by the Court of Claims granting judgments to landowners in uncongested areas for the taking of avigation easements by the Government involved cases in which flights by government-owned aircraft over privately owned lands at altitudes of 500 feet or less above ground level had been of such regularity and frequency, and had created such conditions, as to constitute a direct, immediate, and substantial interference with the use and enjoyment of the property.

The exception mentioned in the preceding paragraph was the decision of the Court of Claims in the case of *Branning v. United States*, 228 Ct. Cl. __, 654 F. 2d 88 (1981). The *Branning* case involved a training program for pilots stationed at the Marine Corps Air Station in Beaufort, South Carolina. Part of the program consisted of an operation referred to as "field mirror landing practice" (MFLP), in which the prescribed flight pattern required trainees to take off from a runway on the station and then fly the aircraft directly over the plaintiff's property in a "race trace pattern" at an altitude of 600 feet above ground level, and

[4] This provision is now codified in 49 U.S.C. § 1301(29) (Supp. IV 1980) and it refers to regulations issued by the Civil Aeronautics Board, successor to the Civil Aeronautics Authority.

return to the runway. The pattern was repeated by each aircraft several times over a period of several days during each month in which the training was conducted. In holding that the Government had taken an avigation easement over the plaintiff's property—although the flights were at altitudes somewhat higher than 500 feet above ground level—the court stated in part as follows (228 Ct. Cl. at __, 654 F. 2d at 90):

> ***A *vital factor of this case* is that defendant devised an exercise to prepare trainees for future landings on aircraft carriers, in which heavy jet aircraft followed one another almost nose to tail in an unvarying loop over plaintiff's land. Trainees were required to hold their planes, preparatory for landing on the supposititious carrier deck, with noses up and tails down, with near maximum power (and noise) associated with low speed. ***Whether use of airspace above 500 feet for noisy air navigation of a more conventional variety can be held a taking is an issue that can be and is reserved for the case that presents it. *In this case our taking holding turns on the peculiar facts the trial judge has found.* [Emphasis supplied.]

The present record is completely devoid of any evidence concerning flights by defendant's military jet aircraft above tracts 1, 2, 3, 4, 5, 7, 9, 10, 12, or 13 that is comparable to the evidence in the *Branning* case.

Because the evidence in the record does not disclose the sort of "peculiar facts" on which the *Branning* decision was based, and because the overflights above tracts 1, 2, 3, 4, 5, 7, 9, 10, 12, and 13 occurred at minimum heights greater than 500 feet above ground level—*i.e.*, in the portion of the airspace where the Government and the general

public ordinarily have the right of free passage—the plaintiffs cannot recover with respect to these tracts.

The record does show that "field carrier landing practice" (FCLP) training exercises were conducted at NAS NO. However, such exercises did not involve intrusions into the airspace above any of the tracts enumerated in the preceding paragraph, with the exception of tract 7.

The FCLP flights above tract 7 were at the minimum height of 600 feet above ground level. Such operations, however, occurred only twice a year, on the average; and, when they occurred, they continued only during a period of from 7 to 10 days. Furthermore, the evidence in the record does not show how the noise from the FCLP operations above tract 7 actually affected persons or activities on the ground, and does not disclose the sort of "peculiar facts" concerning the FCLP operations above tract 7 that led the Court of Claims to hold for the landowner in the *Branning* case.[5]

Even if it were established that FCLP operations above tract 7 resulted in the taking of an avigation easement over the portion of tract 7 not suitable for industrial development, it appears that a claim for the taking would be barred by the pertinent statute of limitations. An action on a claim within the jurisdiction of this court must be instituted within 6 years after the claim first accrues (28 U.S.C. § 2501).

FCLP operations at NAS NO began as early as the

[5] Actually, such "peculiar facts" are lacking as to all the tracts involved in this case.

1970-71 time period, or before the beginning of the 6-year period that immediately preceded the filing of the plaintiffs' complaint. The military jet aircraft used in the FCLP operations during the early 1970's were the A-4 and the F-8 with afterburner. Later, during the 6-year limitations period, newer types of military jet aircraft, the A-7 and the A-37, were used in the FCLP operations at NAS NO. However, the evidence does not establish that the A-7 and the A-37, as they passed above tract 7, were substantially more disturbing because of noise, etc., than the A-4 and F-8 had been (*cf. Davis v. United States,* 155 Ct. Cl. 418, 420-22, 295 F. 2d 931, 932-34 (1961); *Avery v. United States,* 165 Ct. Cl. 357, 362, 330 F. 2d 640, 643 (1964)), or that the A-7 and A-37 flew at substantially lower altitudes over tract 7 than the A-4 and F-8 had flown (*cf. A. J. Hodges Industries, Inc. v. United States,* 174 Ct. Cl. 259, 266-67, 355 F. 2d 592, 597 (1966)). For these reasons, it appears that any avigation easement resulting from FCLP operations over the portion of tract 7 not suitable for industrial development would have been taken before the beginning of the 6-year limitations period.

In addition, it should be pointed out that, as to all the tracts discussed in this part of the opinion, the plaintiffs failed to prove that such adverse consequences as resulted from the defendant's aircraft operations at NAS NO occurred within the 6-year period immediately preceding the filing of the plaintiffs' complaint.

The evidence on damages indicates, first, that at some time in the past—the evidence does not disclose just when—the highest and best use for these areas was for agricultural purposes coupled with holding the lands on the basis of a reasonable expectation that, at some indefinite time in the future, population increases in the New Orleans

metropolitan area would create a demand for the lands to be used for subdivision development of a residential or mixed residential and commercial nature. The evidence further shows that, because of the defendant's aircraft operations at NAS NO, at least parts of tracts 1, 2, 3, 4, 7, and 12 cannot be regarded as having any future potential for subdivision development[6] (although there is nothing to indicate that the usefulness of any of these areas solely for agricultural purposes has been adversely affected to a substantial degree by the defendant's aircraft operations at NAS NO). Consequently, the defendant's aircraft operations at NAS NO have deprived parts of tracts 1, 2, 3, 4, 7, and 12 of a speculative element of value which they once had. Whether this speculative element added substantially to the fair market value of the lands is not revealed by the record.

Moreover, the evidence does not establish that this change occurred during the 6-year period immediately preceding the filing of the plaintiffs' complaint. The plaintiffs did not prove that the military jet aircraft (*e.g.*, the F-100, F-106, A-4, A-7, A-37, and F-4) used in operations at NAS NO during the 6-year limitations period adversely affected the potential of any Hero lands for ultimate subdivision development to a substantially greater degree than did the military jet aircraft (*e.g.*, the F-100, F-102, F-8, A-4, T-33, T-38, and T-39) used in operations at NAS NO before the beginning of the 6-year limitations period. Therefore, it is reasonable to infer, and it is found, that any loss of potential for ultimate subdivision development, because of

[6] This determination is based on the results of an Air Installations Compatible Use Zone (AICUZ) study which was made by the Government with respect to NAS NO.

aircraft operations at NAS NO, occurred more than 6 years before the plaintiffs' complaint was filed. Consequently, any claim based upon such loss would be barred by the 6-year statute of limitations.

Tracts 6 and 11

Tracts 6 and 11 are in a somewhat different category from the other tracts involved in the present case, because the evidence in the record shows that military jet aircraft of the defendant have regularly and frequently overflown tract 6 at a minimum altitude of 340 feet above ground level and have overflown tract 11 at minimum altitudes ranging between 200 and 300 feet above ground level.

With respect to tract 11, the evidence in the record shows that, more than 20 years before the plaintiffs' complaint in the present action was filed, the defendant acquired an avigation easement for the free and unobstructed passage of aircraft through the airspace over all of tract 11. Military jet aircraft of the defendant have been operating at NAS NO ever since aircraft operations started there in 1958, so it is obvious that the avigation easement over tract 11 was obtained for use by military jet aircraft.

In this connection, although FCLP operations at NAS NO involved tract 11, the evidence fails to show that the aircraft (the A-7) which performed such operations above tract 11 within the 6-year limitations period was substantially noisier, or flew at a substantially lower altitude, than the aircraft (the A-4 and the F-8) which performed such operations in the early 1970's, before the beginning of the 6-year period of limitations. Actually, there is nothing in the record to establish that any of the aircraft operations at NAS NO during the 6-year

limitations period, involving such military jet aircraft as the F-100, F-106, A-4, A-7, A-37, and F-4, adversely affected either tract 11 or tract 6 to a substantially greater extent than the operations before the beginning of the 6-year period, which involved such military jet aircraft as the F-100, F-102, F-8, A-4, T-33, T-38, and T-39.

As to both tracts 6 and 11, the evidence on damages is to the effect that the defendant's aircraft operations at NAS NO deprived at least parts of these tracts of a speculative element of value which they once had for subdivision development, based on a reasonable expectation that, at some indefinite time in the future, population increases in the New Orleans metropolitan area would create a demand for these tracts to be used for subdivision development. However, as has been said in connection with other Hero lands, the proof does not establish that this change occurred during the 6-year limitations period.

Therefore, any claim for the taking of another avigation easement over tract 11, or for the taking of an avigation easement over tract 6, must fail because it is reasonable to infer, and to find, that any such taking occurred more than 6 years before the filing of the plaintiffs' complaint.

CONCLUSION OF LAW

Upon the opinion and the facts as found by the court, the court concludes as a matter of law that the plaintiffs are not entitled to recover. The complaint will therefore be dismissed.

No. 83-1337

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERO LANDS COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

DIRK D. SNEL
THOMAS H. PACHECO
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below correctly determined that petitioners' claim for the taking of an avigation easement was barred by the statute of limitations, 28 U.S.C. 2501, because the cause of action accrued more than six years before this lawsuit was filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not yet reported. The opinion of the United States Claims Court (Pet. App. A3-A15) is reported at 554 F. Supp. 1262.

JURSIDICTION

The judgment of the court of appeals was entered on November 10, 1983. The petition for a writ of certiorari was filed on February 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, corporations owning 16 tracts in Plaquemines Parish, Louisiana, near the New Orleans Naval Air Station, sued the United States on November 28, 1979, in the United States Court of Claims (now the United States Claims Court), alleging that overflights to and from the naval air station have taken "avigation easements."

Following a trial on the issue of liability, the Claims Court entered judgment dismissing the complaint. In its opinion, supported by detailed findings of fact,[1] the Claims Court divided petitioners' 16 tracts into three categories, and determined that petitioners were not entitled to compensation for the taking of an avigation easement as to any tract.

The court found that as to the first set of tracts, the highest and best use was and is for industrial development (Pet. App. A5). The court further found that the government aircraft operations at the naval air station have not substantially diminished the value of these lands for such purposes. Accordingly, the United States was not liable for a taking of avigation easements over these lands (*id.* at A5-A6).[2]

The second group of tracts had been overflown at altitudes of not less than 600 feet above ground level, and were not suitable for industrial development (Pet. App. A6-A7). The court determined that the flights over these lands did not constitute a direct, immediate and substantial interference with the use and enjoyment of the property. Thus, it found that no taking had occurred (*id.* at A6-A11). In addition, the Claims Court concluded that, as to all tracts in the second category, the six-year statute of limitations of 28 U.S.C. 2501[3] barred recovery. Specifically, the trial court

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[1]In addition to its opinion, the Claims Court made extensive factual findings in support of its decision. These findings are found at C.A. App. 27-49.

[2]The court also found that some of the tracts in the first category were burdened with avigation easements acquired by the government through eminent domain proceedings in 1958 (Pet. App. A6).

[3]28 U.S.C. 2501 provides in part:

> Every claim of which the United States Claims Court has jursidiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

found that aircraft operations had caused no new adverse consequences during the limitations period (Pet. App. A12-A14) and that changes at the naval air station in 1978-1979 did not create a fresh taking causing accrual of a new claim (*id.* at A12-A15).

The Claims Court also found that the third set of tracts, which were overflown at minimum altitudes of 200-340 feet, had not suffered a taking (Pet. App. A14). Many of these tracts were already subject to an avigation easement acquired through condemnation proceedings in 1958 (*ibid.*). Furthermore, the court determined that aircraft operations at the naval air station during the six-year period immediately preceding this suit did not adversely affect the use of these tracts to any substantially greater extent than they had before this six-year period, despite the operational changes of 1978-1979. Therefore, any taking claim with respect to those tracts was also barred by 28 U.S.C. 2501 (Pet. App. A14-A15).

2. On appeal, the Federal Circuit held (Pet. App. A2) that the statute of limitations embodied in 28 U.S.C. 2501 bars all of petitioners' claims, and that "[i]f any taking occurred, it occurred more than six years before this action was filed, and changes [in aircraft operations at the naval air station] in 1978-1979 were insufficient to constitute a new taking."

ARGUMENT

The decision below, which is based on detailed factual determinations, is correct, does not conflict with any decision of this Court or any other court of appeals and does not present an important question requiring resolution by this Court. Accordingly, further review is not warranted.

1. In effect, petitioners request this Court to review the factual determination of the Claims Court, affirmed by the court of appeals, that any diminution in the value of their property occurred long before the six-year period prescribed by the statute of limitations and that changes in air operations at the naval air station in 1978-1979 were not of sufficient magnitude to cause the accrual of a fresh taking claim (Pet. App. A2, A11-A15). This Court has often stated that, absent extraordinarily compelling circumstances, the Court will not review such factual findings. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); cf. *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8. No such unusual circumstances exist here.

2. Petitioners acknowledge (Pet. 7) that the Claims Court "employed the traditional test and scrutinized the military aircraft operations conducted at [the naval air station] paying particular attention to the fact that jet aircraft operations had been conducted [there] since 1958." Despite their concession that under the "traditional test" and "existing precedent" (Pet. 8) this action is time-barred, petitioners seek to create a novel exception to the statute of limitations because the land they own is uninhabited.

The record in this case does not substantiate petitioners' claim that the effects of the overflights could not be ascertainable by the exercise of due diligence. On the contrary, the proximity of petitioners' "uninhabited" lands to occupied property belies such an assertion.[4] In any event, any factual dispute on this point was resolved against petitioners by the courts below, and is not appropriate for review by this Court. *Branti* v. *Finkel*, 445 U.S. at 512 n.6.

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[4]See map of New Orleans Naval Air Station and surrounding tracts, which indicates the promixity of developed and inhabited lands near the air station. This map was included in the Supplemental Appendix, Vol. IV, filed in the court of appeals.

Petitioners' claim accrued when all events occurred that affected the alleged liability of the government. *Japanese War Notes Claimants Ass'n of the Philippines, Inc.* v. *United States*, 373 F.2d 356, 358 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967), reh'g denied, 390 U.S. 975 (1968); *Sauer* v. *United States*, 354 F.2d 302, 304 (Ct. Cl. 1965). The trial court found that this took place before the six-year period preceding the institution of this action, and petitioners point to no sound reason why this Court should review this factual determination. It follows then that petitioners' accrual argument is without merit and was properly rejected.

3. a. Petitioners' contention that their claim arose upon the 1979 issuance of the Air Installation Compatible Use Zones (AICUZ) study does not merit this Court's consideration. Petitioner's argument misapprehends the nature and purpose of the study, and conflicts with numerous soundly-based precedents.

As the trial court found, the AICUZ study attempts to identify compatible as well as incompatible land uses in the vicinity of an air station, with the aim of encouraging compatible development (C.A. App. 37). It does not (and is not intended to) indicate whether particular aircraft operations over specific parcels of land have reached a level amounting to "substantial interference" with use and enjoyment, thereby constituting a taking. Nor does the AICUZ study, by itself, establish or forecast actual noise levels from specific aircraft, flight patterns or flight directions (C.A. App. 38-39, 42).

Thus, petitioners fundamentally err when they argue (Pet. 7) that the AICUZ study informed them "for the first time" that the land is unsuitable for residential development as a result of jet overflights. The AICUZ document does

not give notice of a compensable "taking." AICUZ recommendations are acceptable for community-wide planning purposes, particularly where, as here, the planners appreciate the limitations of the study and the need for additional information. The methodology, however, has severe limitations when the question is one of individual annoyance and of interference with individual enjoyment of property, as in this case. Because of these serious limitations, the AICUZ study neither creates nor gives notice of a Fifth Amendment taking.

b. To hold that the dissemination of an AICUZ study causes the accrual of a compensable taking claim would be mistaken from both a legal and a public policy standpoint. In *NBH Land Co.* v. *United States*, 576 F.2d 317, 318 (Ct. Cl. 1978), the Court of Claims rejected the contention that communications by Army officials to local interests of an intent to acquire land owned by plaintiffs destroyed the marketability of the property and constituted a taking under the Fifth Amendment. The court stated that "[m]ere candor by public officials about their plans has never been held to constitute a taking." 576 F.2d at 319. The same sound reasoning should apply to preserve the cooperation fostered by the AICUZ program.

On several occasions the Court of Claims has rejected the argument that contacts and influence on local zoning officials who have the authority to upzone or downgrade property constitute a taking. *De-Tom Enterprises, Inc.* v. *United States*, [redacted], 552 F.2d 337, 339-340 (Ct. Cl. 1977); *Nalder* v. *United States*, 217 Ct. Cl. 686 (1978) (involving "Greenbelt," a predecessor concept to AICUZ). The government does not effect a taking when it, "as an interested landowner, does no more than convince a state or local agency to impose" a restriction on development, "in

the same way as might any other neighboring property owner or citizen." *De-Tom*, 552 F.2d at 339.[5]

If the AICUZ concept is viewed as government regulation, petitioners' claim that the AICUZ study in effect constituted a taking is refuted by the rule that government regulatory action that temporarily reduces property values or results in a loss of potential profits is not a taking. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 131 (1978); *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1191 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). Cf. *Agins* v. *City of Tiburon*, 447 U.S. 255, 263 n.9 (1980); *Fresh Pond Shopping Center, Inc.* v. *Rent Control Board of Cambridge*, 388 Mass. 1051, 446 N.E. 2d 1060, appeal dismissed, *sub non. Fresh Pond Shopping Center, Inc.* v. *Callahan*, No. 82-2151, (Oct. 11, 1983). Of course, here petitioners have not even demonstrated a reduction in property values or loss of potential profits, apart from purely speculative losses.

4. Finally, the trial court found that the government's aircraft operations had not prevented the highest and best uses to be made of petitioners' tracts (Pet. App. A5-A6, A13). The court found only that the government's air operations had deprived parts of certain tracts of a "speculative element of value" as sites for residential and commercial development. The court found that the evidence did not disclose that this speculative element added substantially to the fair market value of the lands (Pet. App. A12-A13, A15). Petitioners must prove "substantial interference"

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[5]Furthermore, the AICUZ program recognizes that zoning is a matter of local government action. In this case, Chalin O. Perez, President of the Plaquemines Parish Commission Council, informed the former commanding officer of the naval air station that under no circumstances would the Council surrender its authority to the federal government (Tr. 413; C.A. App. 186).

with the use and enjoyment of their property in order to recover for an overflight taking. *United States* v. *Causby*, 328 U.S. 256, 266 (1946); *A.J. Hodges Industries, Inc.* v. *United States*, 355 F.2d 592, 594 (Ct. Cl. 1966). Interference with a merely speculative element of value, which has not been shown to add in any substantial way to the property's fair market value, does not constitute "substantial interference" with petitioners' use of the land. See *Pueblo of Sandia ex rel. Chaves* v. *Smith*, 497 F.2d 1043, 1046 (10th Cir. 1974); *Speir* v. *United States*, 485 F.2d 643, 648 (Ct. Cl. 1973); *Mid-States Fats and Oils Corp.* v. *United States*, 159 Ct. Cl. 301, 310 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

DIRK D. SNEL
THOMAS H. PACHECO
Attorneys

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